principle which governs the case is this, that the legatee shall not be entitled to receive out of the estate of the testator any part of the bounty intended for him by the testator until he has paid all his obligations in the shape of debts which may be due to that estate. That seems to be an intelligible principle; and it is one which was stated by Lord Cottenham in the case of Cherry *v.* Boultbee (2 Keen, 319; S. C. on appeal, 4 M. & C. 442). In that case Lord Cottenham said that the principle would be applicable, where the executor, who was bound to pay the legacy, was the same person who was entitled to receive payment of the debt. It seems to me that the principle which I have stated is countenanced by what was said by Lord Cottenham in that case. I cannot satisfy my mind that it would be an intelligible principle to act upon, or that I should be justified in making an order that the assignees of this bankrupt partner should be allowed to receive the legacy given to an individual partner who is the legatee, so long as the partnership debt of the firm of which he was a member remains undischarged. I do not think 'retainer' or 'set-off' is a proper expression, for it is not a question of retainer or set-off, but a question of right on the part of the legatee to receive payment of the legacy, having regard to the amount of the debt due to the testator's estate. The declaration will be in those terms."

It will no doubt be a satisfaction to Judge Holt to know that his decision of this quite difficult point is so aptly supported by this old case, and the "Virginia Law Register" tenders him its hearty congratulations on his well deserved promotion to the Circuit Bench.

J. F. M.

SUPREME COURT OF APPEALS OF VIRGINIA.

ATKINSON *et al. v.* SOLENBERGER *et al.*

Nov. 17, 1910. On Rehearing, Nov. 16, 1911.

[72 S. E. 727.]

1. Trial (§ 2*)—Trial of Causes Together.—An order that two causes be proceeded with and heard together does not have the effect of making depositions taken in one of them, before the order, evidence in the other; the parties thereto not being the same, and the effect of hearing the two together not being to make them one cause.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 2.*]

2. Fraudulent Conveyance (§ 248*)—Suit to Avoid—Limitations.—Code 1904, § 2929, declaring a limitation of five years for bringing suit to avoid a conveyance, for the cause only that it was not on a valuable consideration, while applying where the grantee receives it without reason to suspect the grantor was insolvent and without any purpose to defraud his creditors, does not apply where one, with

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

intent to defraud his creditors has property conveyed to another having notice of such intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 248.*]

3. Fraudulent Conveyances (§ 278*)—Conveyances to Wife—Presumption.—A purchase by a wife from her insolvent husband or from another with means furnished by him is prima facie actually fraudulent as to the husband's creditors, and casts the burden on the wife to show clearly that the consideration was in good faith paid by her out of her own separate estate.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 801, 802; Dec. Dig. § 278.*]

4. Husband and Wife (§ 149*)—Rights of Husband's Creditors—Services of Husband to Wife—Support of Family by Wife.—Independently of whether one is a laboring man, within Code 1904, § 3652, declaring wages owing to such a man, not exceeding a certain amount per month, exempt, where his creditors are seeking to charge his wife with the value of his services rendered to her, she, having supported the family with her own means, while he was rendering such services for her, may set off what she has so advanced for the reasonable support of him and the family during such period; his creditors being entitled to no more than he could have recovered.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 149.*]

On Rehearing.

5. Reference (§ 63*)—Admission of Evidence—Irrelevant Evidence.—In a suit by creditors to set aside a conveyance to a trustee for the debtor's wife of land claimed to have been purchased with the debtor's money, in which the debtor claimed compensation for managing the wife's estate, a reference was ordered to report upon the question of compensation to the husband, and on any other matter deemed pertinent by the commissioner or required by any party in interest. Held, that evidence to sustain the good faith of executing the deed to the wife was inadmissible; it being essential that the evidence be confined to the questions upon which the commissioner is ordered to report.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 63.*]

6. Reference (§ 48*)—Report—Matters Reported.—A general direction, in an order of reference requiring the commissioner to report on any other matter deemed pertinent by himself or required by any party in interest, does not authorize him to report upon questions wholly different from that referred, but only upon matters incidental and germane.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 75; Dec. Dig. § 48.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

7. Witnesses (§ 52*)—Competency—Husband and Wife.—Under Code 1904, § 3346a, prohibiting husband or wife from testifying for each other in any proceeding by a creditor to avoid a conveyance from the one to the other on the ground of fraud, in proceedings by a creditor to set aside a conveyance, made to a trustee for the debtor's wife, of land claimed to have been purchased with the debtor's money, depositions of the debtor and his wife as to the good faith in executing the deed were not admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124-136; Dec. Dig. § 52.*]

Appeal from Circuit Court, Frederick County.

Suit by Atkinson, administrator, and others, against Solenberger and others. From the decree, complainants appeal. Reversed in part.

R. T. Barton and *Carrol G. Walter,* for appellants.
Ward & Larrick and *Quarles & Pilson,* for appellees.

BUCHANAN, J. One of the objects of the proceedings in this cause was to set aside a deed executed February 14, 1894, by John W. Solenberger to his son Noah W., as trustee for Barbara, the latter's wife, and to subject the lands conveyed to the payment of a debt evidenced by a judgment against Noah W., upon the ground that the lands conveyed were in fact purchased and paid for by the husband and the deed executed to the wife, without consideration passing from her, and was so made for the purpose of defrauding the husband's creditors, and that she had notice of such intent when the conveyance was made. Another object of the proceedings was to subject other lands than those conveyed by the deed of February 14, 1894, and the value of services rendered by the said husband for his wife Barbara.

This cause was heard with the cause of Joseph W. Solenberger, Adm'r *v.* Noah W., his Wife and Others, and a decree entered refusing to set aside the conveyances attacked, charging Barbara, the wife, with the value of her husband's services, and crediting her thereon with the amount which the court deemed necessary for the reasonable support of the husband and family during that period. From that decree this appeal was taken.

[1] The first error assigned is to the action of the court in refusing to set aside the deed of February 14, 1894. This suit was instituted in December, 1903, nearly nine years after the conveyance of February 14, 1894, was recorded. The beneficiary in the deed claims in her answer that her husband was indebted to her, and that the consideration of $3,000 for which he executed his bonds to his father, the grantor, was for the debt

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & F p'r Indexes.

which he owed. It is conceded in the brief of the appellees that there is "nothing in the record apart from the averment of the answers and the recital in the deed that the consideration of $3,000 was paid by said trustee, i. e., out of her separate estate; but it does appear that her trustee had used her money to an amount greater than the consideration named."

The evidence relied on to show that the trustee (husband) had used his wife's money is the depositions of the husband and the wife, taken in the cause of Joseph W. Solenberger *v.* Noah W. Solenberger, in the year 1904, two years before that case and this were ordered to be proceeded with and heard together. These appellants were not parties to that suit, and are not affected by the evidence taken in it. The effect of hearing the cases together was not to make the two one cause.

"The parties," as correctly stated in 8 Cyc. 608, "in one suit do not become parties to the other, and their rights still depend or turn on the pleadings, proof, and proceedings in the respective causes. The issues remain precisely as they were, and are to be determined exactly as if the cases had been heard separately. In short, the consolidation (in equity) merely operates to carry on together two separate suits supposed to involve identical issues, and is intended to expedite the hearing and diminish the expense." See, also, Daniel's Ch. Pr. note 3, p. 797 (5th Am. Ed.); Judge (now Justice) Lurton's opinion in Toledo, etc., Ry. *v.* Continental T. Co., 95 Fed. 497, 506, 36 C. C. A. 155.

[2] Having failed to establish by clear and satisfactory evidence, or even to show at all, that any such indebtedness existed from the husband to the wife, the conveyance to her is without consideration and merely voluntary as to her. But, as this suit was not instituted until more than five years after the recordation of the deed, the right to have it set aside, merely because it was made to the wife without consideration deemed valuable, would be barred by the statute of limitations. Code, § 2929.

But the appellants not only allege that the conveyance as to the grantee was voluntary, but that the lands were purchased and paid for by the husband and the conveyance made by his wife for the purpose of hindering, delaying, and defrauding his creditors, and that she had notice of such intent. If this allegation of actual fraud be sustained by the evidence, section 2929 has no application to the case. Flook *v.* Armentrout, 100 Va. 638, 42 S. E. 686; Snoddy *v.* Haskins, 12 Grat. 363.

It appears from the answer of the wife to the bill of Joseph W. Solenberger, a copy of which is filed with the bill in this case, that at the time the conveyance was made she knew that her husband was insolvent, as did his father, the grantor, and that the husband could not hold property because of his financial condition; that the grantor urged her to purchase the land, and said

that he would accept time bonds of her husband for $3,000 in consideration and satisfaction of the purchase price of the land. There is no claim made in the answer that her husband was indebted to her, or that she was furnishing any part of the consideration, directly or indirectly. The answer further states that her husband had paid at that time $900 on account of the purchase price, evidenced by the bonds. It thus appears that the wife knew that her husband was insolvent at the time the conveyance was made to her and that he and not she was to pay the purchase price of the lands conveyed. Both the husband and the wife knew when the conveyance was made that he was providing for her at the expense of his creditors—that he was doing what he had no right to do.

This is not a case where money or property is received from an insolvent donor by one who has no reason to suspect such insolvency and without any purpose to defraud the creditors of the donor. In such a case, the transaction being merely voluntary, it is as to the donee constructively fraudulent and must be attacked within the five years; but where the donee has knowledge of the fact that the donor is insolvent and the natural and necessary effect of the transaction is to hinder, delay, or defraud the donor's creditors, it is actually fraudulent, not only as to the donor but also as to the donee.

[3] It is settled law in this state that in a contest between the existing creditors of an insolvent husband and his wife, touching an alleged purchase from her husband or from another with means furnished by him, the transaction is prima facie presumed to be actually fraudulent, and the burden is on the wife to show by clear and satisfactory evidence that the consideration was in good faith paid by her out of her own separate estate, and not by her husband. See Richardson *v.* Pierce, 105 Va. 628, 54 S. E. 480, and cases cited; 2 Min. Real Prop. § 1181, and cases cited in note 8.

The contention of the wife, that the transaction of February 14, 1894, was in fact a gift and not a sale, is in conflict with the averments of her pleadings in this cause, for in them she claims that she furnished the consideration for the conveyance. It is in conflict with her answer in the case of Solenberger's Adm'r *v.* Solenberger, filed as an exhibit in this cause. In that answer her claim is that the consideration was to be furnished and was in fact furnished by her husband. There is no evidence that the transaction was intended to be a gift, except that the grantor accepted the bonds of his insolvent son without reserving a lien upon the land conveyed.

Upon the whole case, we are of opinion that the conveyance of February 14, 1894, was, as to the wife, not only voluntary, but actually fraudulent; that the appellants have not been guilty

of such delay in asserting their rights as to bar them from the relief sought; and that the trial court erred in not setting aside the said conveyance as fraudulent and void.

[4] Another error assigned is that "the appellees were not entitled to have an exemption or an allowance, for the support of the family, set off against the amount ascertained to be due for services" rendered by the husband.

The commissioner, to whom was referred the question, found that the husband had rendered valuable services to the wife in the management of her property, for which a fair compensation would be $600 per annum during the five years preceding the institution of this suit. The commissioner also found that all the means for the support of the husband and the family had been furnished by the wife during the said five years. This support the commissioner estimated as worth $500 per annum, and credited the same upon the amount he ascertained as the value of the husband's services. Upon a hearing of the cause, the court sustained an exception to the commissioner's report, filed by the husband and wife, as to the amount allowed by the commissioner as a proper sum to be credited on the value of the husband's services for the support of his family, and increased that amount from $500 to $600 per annum.

The objection made to the action of the court is not, as we understand it, to the amount allowed by the court for the support of the family, but to any allowance whatever.

The allowance is objected to on two grounds: (1) That the husband as the general manager or trustee of his wife's property was not a laboring man, within the meaning of section 3652 of the Code, which exempts from distress, levy, or garnishment the wages of a laboring man, being a householder, not exceeding $50 per month. (2) That an insolvent debtor, whose creditors are subjecting to the payment of their claims the value of his services, is not entitled to an allowance for the support of himself and family when it appears that the means for such support have not been furnished by him.

Where a husband renders services for his wife, whether under an express or implied agreement, his creditors have the right to subject the value of such services to the payment of their debts, less the amount necessary for the reasonable support of the husband and his family. See Catlett *v.* Alsop, Mosby & Co., 99 Va. 680, 687; Penn *v.* Whitehead, 17 Grat. 503, 525, 94 Am. Dec. 478; Id., 12 Grat. 74, 80.

The fact that during the period the husband is rendering services for the wife she supports the family is no reason why, when his creditors are seeking to charge her with the value of his services, she should not be permitted to set off what she has advanced for the reasonable necessary support of the husband and his family during the period she is charged with the value of his

services. If the husband himself, under like circumstances, were to sue his wife to recover the value of his services, it is clear that he could only recover from her the value of his earnings or wages in excess of a reasonable support for himself and family. The creditors are entitled to no more. See Catlett *v.* Alsop, Mosby & Co., supra; Penn *v.* Whitehead, supra.

It is unnecessary to consider the question whether or not the husband, in this case, is a "laboring man," within the meaning of section 3652 of the Code, since independent of that section, where creditors are in a court of equity seeking to subject to the payment of their debts the earnings or wages of an insolvent husband in the employment of his wife, they can only subject so much thereof as is in excess of a reasonable support for himself and family. See authorities cited above.

For the error of the trial court in refusing to set aside as fraudulent and void the conveyance of February 14, 1894, the decree appealed from, to that extent, must be reversed and set aside, and in other respects affirmed; and the cause remanded to the circuit court for further proceedings to be had not in conflict with the views expressed in this opinion.

Reversed in part.

CARDWELL, J., absent.

On Rehearing.

WHITTLE, J. Upon a former hearing this court reversed the decree of the circuit court in so far as it refused to set aside the deed of February 14, 1894, from John W. Solenberger to Noah W. Solenberger, trustee for his wife, Barbara, on the ground of actual fraud, being of opinion that the land in controversy was purchased and paid for by the husband, who procured the title to be conveyed to himself, as trustee for his wife, for the purpose of hindering, delaying, and defrauding his creditors.

There is no occasion to depart from the conclusion reached by the court on that issue upon the evidence then before us. Since the last hearing the appellees have supplemented the former record by bringing up proceedings on an amended and supplemented bill in the principal case, and on an original bill filed by Joseph W. Solenberger against appellees. The trial court sustained demurrers to these several bills, save only with respect to the allegation common to both that Noah W. Solenberger had rendered services for his wife in the management of her property, compensation for which was liable to payment of his debts. The cases were then ordered to be heard together, and a specific reference was made to a commissioner in chancery touching the question of compensation for alleged services of the husband. The decree also contained the usual provision that the commissioner should report any other matter deemed pertinent by himself or required by any party in interest, and should certify the evidence to the court.

[5] Upon this reference, Noah W. Solenberger and wife gave their depositions tending to sustain the bona fides of the deed of February 14, 1894. Their evidence was plainly irrelevant to the question referred to the commissioner, and was objected to on that ground. Indeed, the evidence related to a subject expressly eliminated by the court (in sustaining the demurrer) from the pleadings upon which the reference was ordered.

It is a fundamental rule of practice that the evidence must be directed and confined to the questions upon which the master is ordered to report. Ware *v.* Starkey, 80 Va. 191, 198; 2 Bar. Chy. Pr. 635; 2 Daniel's Chy. Pl. & Pr. 1296.

A party can neither be expected nor required to present evidence to a tribunal upon an issue which it has no jurisdiction to pass upon. And, conversely, such party is not to be prejudiced by the transgression on the part of his adversary of a rule of practice, upon the observance of which depends the due and orderly administration of justice. Therefore, for the reason that the controversy concerning the validity of the deed was not within the pleadings or issues referred to the commissioner, depositions on that subject were inadmissible.

[6] The general direction found in the decree, that the commissioner shall report any other matter deemed pertinent by himself or required by any party in interest, does not warrant departure from the rule of practice adverted to, but it is merely intended to include matters which are germane and incidental to the questions specifically referred.

[7] The depositions in question were excepted to and were inadmissible for the further reason that Noah W. Solenberger and his wife were incompetent witnesses under the statute (Va. Code, 1904, § 3346a), which declares that "neither husband nor wife shall be competent to testify for or against each other in any proceeding by a creditor to avoid or impeach any conveyance, gift, or sale from the one to the other on the ground of fraud or want of consideration."

The cross-error assigned by appellees involves the contention that moneys expended by the wife for the support of the family stand on the same footing as moneys paid by the wife to the husband without promise on his part to repay the same. But the contrary principle is well settled—that money so expended by the wife is a proper set-off to the demand of the husband against her for services. The creditor of the husband can occupy no higher ground in such case than his debtor. Penn *v.* Whitehead, 17 Grat. 503, 94 Am. Dec. 478; Catlett *v.* Alsop, Mosby & Co., 99 Va. 680, 40 S. E. 34.

For these considerations, we shall adhere to the decision reached on the former hearing.

Reversed.